Petition

81-1010

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ALEXANDER L. STEVAS,
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____ Term,

JAMES R. PURTILL,
Appellant

v.

PATRICIA R. HARRIS, Secretary
Department of Health and Human Services

and

JAMES F. MELLODY, EVERRET F. BRYANT,
ROBERT L. GRIFFITH, THOMAS J. KENNEDY,
MAURICE J. HARTMAN, ALWYN L. CARTY,
HAMPTON D. JESSE, JR. and DOROTHY J. WATSON,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Petitioner's status as an employee of the federal government preclude a *Bivens* action by the Petitioner against other federal employees for those employees' violations of the Petitioner's Fifth Amendment rights in the form of retaliation, intimidation and harassment directed against the plaintiff for his pursuit of administrative remedies under the ADEA?

2. Does the existence of an incomplete remedy pursuant to the ADEA preempt a *Bivens*-type cause of action against individual federal employees who acted individually and in concert with each other to retaliate, intimidate and harass the Petitioner for his pursuit of administrative remedies under the ADEA?

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HAMPTON D. JESSE, JR. and DOROTHY J. WATSON,

Respondents (1)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, James R. Purtill, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit as rendered in this case on August 24, 1981.

1. This caption contains the names of all parties to the proceedings in the Courts below.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional provisions and statutes.

The relevant parts of which are set forth in Appendix D (A-27 to A-29) hereto.

Art. II, §2 C1. 1, U.S. Const.
Amend. V, U.S. Const.
28 U.S.C. §1254 (1)
28 U.S.C. §1331 (a)
28 U.S.C. §1343
29 U.S.C. §633a
29 U.S.C. §633a(c)

OPINIONS BELOW

The Court of Appeals' Opinion (A-1 through A-10) appears at 658 F.2d 134. A copy of the District Court's unpublished opinion appears at A-11 attached hereto.

JURISDICTION OF THIS COURT

The Court of Appeals' Judgment bears the date of August 24, 1981. It was entered on that day. The Petitioner (hereinafter referred to as Purtill) did not apply for rehearing. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254 (1).

STATEMENT OF CASE

Petitioner, James Purtill, age fifty-four (54), instituted this suit by Complaint on August 1, 1980. In Count I of the Complaint, Purtill alleged violations of the Age Discrimination In Employment Act 29 U.S.C. §621 *et seq.* on the part of his employer, the Department of Health and Human Services. In Count II of the Complaint, Purtill set forth a pattern of conduct on the part of individual supervisors and employees of the DHHS which clearly demonstrates that his rights, guaranteed by the Fifth Amendment of the United States Constitution, have been violated. The remedies sought by Purtill in Count II of his complaint are based on this Court's decisions in *Bivens vs. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and *Carlson vs. Green*, 446 U.S. 14 (1980).

Purtill began his employment with the United States Government in 1957 as a Claims Representative, GS-6, with the Social Security Administration. In 1965, he entered a Social Program Center under the Social Security Administration and held the position of Claims Authorizer as a GS-10.

In 1972, Purtill entered a Federal Staff Development Program in which he remained for approximately six (6) months and then was promoted. The purpose of this program was to give federal employees varied experience by working in different positions throughout the federal government system. In 1973, Purtill was again promoted and transferred to the Medicare Regional Office as a GS-12, Staff Assistant. Since 1973, Purtill has continued in that position.

In August, 1978, the Philadelphia Regional Personnel Office posted a Vacancy Announcement, No. 78-215, advertising the availability of two (2) Medicare Contractor Operations Specialist (GS-13) positions. Purtill applied for a promotion under the vacancy announcement, since he aspired to advance into a higher grade

and had previously worked in the same field and performed all of the duties of the advertised position for a period of two (2) full years.

On September 28, 1978, Purtill received notice that although he was on the "Best Qualified List", the vacancies had been filled by two individuals, who were aged thirty-four (34) and thirty-two (32) respectively.

The appointing official was Maurice Hartman, formerly Regional Medicare Director, who made the selection after conferring with Robert L. Griffith, former Director of Division of Program Operations.

On November 7, 1978, Appellant filed a Complaint of Discrimination in Federal Government, on the ground that he was non-selected for the Medicare Contractor Operations Specialist position solely because of his age.

Said Complaint has run the full gamut of administrative review as is evidenced by the EEOC Final Decision, dated December 4, 1980, which decision found against Purtill.

In January of 1979, the Philadelphia Regional Office acting for the Medicare Regional Office posted Vacancy Announcement No. 79-10 advertising the availability of the position of Medicare Contractors Operations Specialist (GS-13) in the said Medicare Office. The number of vacancies was not specified in the Vacancy Announcement.

Purtill once again applied for the promotion, since his work experience within the Department more than adequately satisfied the requirements set forth in the Vacancy Announcement.

Although the Vacancy Announcement did not indicate the number of positions available, three (3) individuals were in fact promoted. These individuals were aged twenty-nine (29), thirty (30), and fifty-five (55). Purtill, when notified of the appointments, was informed that he had been on the "Best Qualified List" for these positions.

Believing that he had once again been non-selected for the vacant position solely because of his age and fur-

ther, that the appointment of a fifty-five (55) year old individual had been done for the improper purpose of fabricating and inventing a defense to his first EEOC Complaint, Purtill filed another Complaint with the EEOC on May 12, 1979.

Said Complaint has never been acknowledged or acted upon by the EEOC — therefore, since 180 days had passed since the initial filing of the Complaint, Purtill included the allegation of this claim in Count I of his Federal Court Complaint. (A-17). Jurisdiction in the United States District Court for the Eastern District of Pennsylvania rested on 29 U.S.C. Section 633 a(c), 28 U.S.C. Section 1343 and 28 U.S.C. Section 1331.(A-16).

Throughout the period described above and continuing to the present time, the individual respondents have engaged in personal misconduct directed against Purtill outside the scope of their employment in the form of retaliation, harassment and intimidation. This retaliatory conduct included lowering of Purtill's job performance appraisals; constant questioning of Purtill's work; overruling for no apparent reason decisions which were made previously by Purtill on a routine basis; and assigning work to others which normally fell within his area of responsibility. All of these retalitation measures have hindered and continued to hinder Purtill's career advancement opportunities within the Department.

Said vindictive and wilful behavior on the part of the individual respondents has severely hampered Purtill's future prospects for advancement in his employment and caused the Appellant daily mental and physical anguish, all of which is in violation of the rights guaranteed Purtill by the Fifth Amendment. (A-27).

In response to Purtill's Complaint, Respondents filed a Motion to Dismiss Complaint and/or Motion for Summary Judgment. Said Motion averred that Purtill had failed to exhaust his administrative remedies and further, that a direct action did not lie against the individual Respondents. Notwithstanding the fact that a Fi-

nal Decision had been rendered by the EEOC, the District Court entered an Order and Memorandum on December 16, 1980, sustaining Respondents' Motion for Summary Judgment on two grounds: 1) Purtill had failed to exhaust his administrative remedies and 2) the ADEA preempted any claim Purtill might have against the individual Respondents. (A-11).

Purtill appealed the District Court's decision to the Third Circuit Court of Appeals on January 9, 1981. On August 24, 1981, The Third Circuit Court affirmed the District's Court judgment but remanded Count I of Purtill's Complaint to the District Court so that Purtill could have an opportunity to amend his Complaint with an allegation that he had exhausted his administrative remedies. (A-9).

As to Count II of his Complaint, The Third Circuit dismissed Purtill's contention that he was entitled to legal and equitable relief under the Constitution against the individual Respondents.

Notwithstanding this Court's finding that there exists a *Bivens* right of action against Federal employees who engage in violating an individual's constitutional rights, *Bivens vs. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Carlson vs. Green*, 446 U.S. 14 (1980), The Circuit Court held based on *Brown vs. GSA*, 425 U.S. 820 (1976) that Purtill could not maintain a *Bivens* action against the individual respondents. (A-6).

The Third Circuit further rejected Purtill's contentions that there exists under the Constitution an implied *Bivens* right of action against the individual Federal employees who have harassed, intimidated and engaged in retaliation against him on the grounds that the federal employer — employee relationship constitutes a "special factor that counsels hesitation in recognizing a constitutional cause of action." The Third Circuit summarily accepted the Fifth Circuit Court's finding of such a special factor in the case of *Bush vs. Lucas*, 647 F.2d 573,

(1981), which had been remanded by this Court to the Fifth Circuit "for further consideration in light of *Carlson vs. Green.*" *Bush vs. Lucas*, 446 U.S. 914 (1980).

Following the Fifth Circuit's most recent pronouncement in *Bush*, the plaintiff therein has petitioned this Court for review on September 4, 1981.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. The Third Circuit Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

The Third Circuit's dismissal of the allegations against the individual defendants in Count II of Purtill's Complaint (A-22), in effect relegates Purtill and other federal civilian employees to a class of inferior United States citizens who must sit back silently while their supervisors and co-employees continue on a course of conduct which causes immense personal and professional grief, embarassment and intimidation and violates Purtill's Fifth Amendment right to be free from illegal discrimination.

This Court has held that "justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than judiciary to enforce those rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Davis vs. Passman*, 442, U.S. 228 at 241 (1979).

The Third Circuit has held that the legislative history of the ADEA mandates that the ADEA be consid-

ered the exclusive remedy for an individual who raises allegations of age discrimination in the federal government workplace (A-6), although the ADEA provides for remedies against the government only, and thus permits its workplace supervisors and employees to continue their vendettas of retaliation against other federal employees who allege discrimination based upon their age.

The Third Circuit has completely disregarded this Court's pronouncements in *Carlson vs. Green*, 446 U.S. 14 (1980), *Davis vs. Passman*, 442, U.S. 228 (1979), and *Bivens vs. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Rather, the Circuit Court opted to skirt the real issue at the heart of this matter and based its decision on the proposition that *Brown vs. G.S.A.* 425 U.S. 820 (1976). and *Lehman vs. Nakshian*, U.S. , , 49 U.S. L.W. 4835 (June 26, 1981) mandate a finding that the ADEA be considered the exclusive remedy for Purtill's allegations of constitutional violations against the individual respondents herein.

Purtill contends that the Third Circuit engaged in a blanket acceptance of the interpretations of legislative intent in *Brown* and *Lehman*, although neither case even remotely dealt with the issues which Purtill brings before this Court.

Although Purtill urged the Third Circuit to review the legislative history of the ADEA in conjunction with this Court's recent decisions in *Carlson* and *Bush vs. Lucas*, 598 F.2d 958 (5th Cir. 1979) *vacated and remanded* 446 U.S. 914, *on remand* 647 F.2d 573 (1981), (Petition for cert. filed September 4, 1981), the Court of Appeals declined to do so.

A brief glimpse into the legislative history of the ADEA illuminates the unique problem which the ADEA framers sought to remedy.

In that regard, Representative Burke of Massachusetts identified the nature of the discrimination which the ADEA addressed:

> "Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. These discriminations result in non-employment because of feelings about a person entirely unrelated to his ability to do a job. This is hardly a problem for the older jobseeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance." 113 Cong. Rec. at 34742 (1967).

When the ADEA was amended in 1974 to extend coverage to federal government employees, Senator Bentsen, the principal proponent of ADEA extension to federal employees, declared that the purpose of the amendment was to afford to government employees the same protections against arbitrary employment based on age as are available to employees in the private sector. 120 Cong. Rec. 8768 (1974).

In *Carlson vs. Green*, this Court held that a victim of a constitutional violation has a right to recover money damages against federal employees when certain conditions are satisfied.

If employees in the private sector are granted the right to seek redress for constitutional violations, then in light of Congress' comprehension of the purposes of the 1974 ADEA amendment, Purtill, as a government employee is likewise entitled to assert a *Bivens* claim against federal employees who have harassed, intimidated and engaged in retaliation towards him for his pursuit of an age discrimination claim, all of which are in violation of the Fifth Amendment.

Purtill submits that the remedies available to a federal civilian employee alleging discrimination based upon his age should not be limited to those remedies set forth in the ADEA when such claims are based on retaliatory conduct of government supervisors and co-employees who possess and abuse authority which can destroy an aggrieved employee's professional career. Petitioner

submits that the right to invoke the existing jurisdiction of the Courts for the protection of his justiciable constitutional rights is a paramount right concommitant with his status as a citizen. If such rights is to be stripped from him because of his position as a government civilian employee, then that deprivation should proceed from this Court, the final arbiter of fundamental and substantial constitutional issues.

II. The Third Circuit Has Decided A Federal Question In A Way Which Is In Conflict With Applicable Decisions Of This Court.

In *Bivens vs. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court established that an individual whose constitutional rights were violated by a federal agent had a right to recover damages against the agent in federal court notwithstanding the lack of a statute conferring such a right.

In *Carlson vs. Green*, 445 U.S. 14, (1980), this Court resolved the issue of the propriety of a *Bivens* claims for damages when there are available other modes of relief. In that regard, this Court stated that a victim of a constitutional violation has a right to recover money damages against a federal official in a *Bivens* action and such claims will only be defeated when:

> (1) "defendants demonstrate special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396, 91 S. Ct. at 2004, *Davis vs. Passman*, 442 U.S. 228, 245, 99 S. Ct. 2264, 2277, 60 L.Ed. 2d 846 (1979).
>
> (2) When defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the constitution and viewed as equally effective." *Bivens*, supra, *Davis*, supra.

Although the Government need not demonstrate Congress' recitation of "magic words" establishing that it has created an exclusive remedy for constitutional violations in the ADEA, *Carlson*, supra, the Third Circuit has stated that the first test of *Carlson* is satisfied, simply because this Court has found such legislative intent under §717 of the Civil Rights Act 42 U.S.C. 2000e 16. in *Brown vs. G.S.A.*, 425 U.S. 820 (1976).

This application of the first *Carlson* test is inappropriate in that this Court has stated in *Carlson* that the proper analysis is "whether Congress has indicated that it intends the statutory remedy to replace rather than to complement the *Bivens* remedy." *Carlson*, 445 U.S. 14 at n.5.

The Third Circuit's failure to demonstrate the requisite congressional intent is significant. Indeed, the Third Circuit found it necessary to attempt to characterize Purtill's claim in the second situation set forth in *Carlson*.

In that regard, the Third Circuit adopted the Fifth Circuit's conclusion in *Bush vs. Lucas*, 647 F.2d 573 at 577 where the Court held that the federal employer-employee relationship is a "special factor that counsels hesitation." (A-7).

The Fifth Circuit, The Third Circuit echoed, "was guided by 'the well established rule that the government has traditionally been granted the widest latitude in the dispatch of its own affairs.' " (citing *Sampson vs. Murray*, 415 U.S. 61, (1974)). (A-7)

Such rationale, however, flies in the face of the most fundamental of principles reiterated by this Court since *Marbury vs. Madison*, 1 Cranch 137, 2L.ED 60 (1803):

> Our system of jurisprudence rests on the assumption that all individuals whatever their position in government are subject to federal law:
> No man in this country is so high that he is above the law. . . . All the officers of the government from

> the highest to the lowest, are creatures of the law and are bound to obey it. *United States vs. Lee*, 106 U.S. at 220 (1882), *Butz vs. Economou*, 438 U.S. at 504, 1978, *Davis vs. Passman*, 443, U.S. at 246 (1979).

Thus, unless Purtill's *Bivens* claims is permitted to stand, the individual respondents herein will be permitted to continue their retaliatory course of conduct upon Purtill, very likely only to desist when Purtill's career opportunities have been reduced to a nullity. Certainly, this Court cannot have contemplated such a distorted result for the aggrieved federal civilian employee when it stated in *Carlson:*

> . . . . [t]he *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose. See *Butz vs. Economou*, 438 U.S. 478, 505 98 S. Ct. 2894, 2910, 57 L. Ed. 2nd 895 (1978). Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect *** surely particularly so when the individual official faces personal financial liability. . . . Punitive damages are a particular remedial mechanism normally available in the Federal Courts," *Bivens* 403 U.S. at 397, 91 S. Ct. at 2005, and are especially appropriate to redress the violation by a government official of a citizen's constitutional rights. *Carlson vs. Green*, 1005 S. Ct. 1468, 1473 (1980).

III. This Court Must Resolve The Conflict Which Has Emerged Among The Courts of Appeals.

In *Sonntag vs. Dooley*, 650 F.2d 904 (1981), the Seventh Circuit has held that a former federal civilian employee possesses a *Bivens* right of action against

other federal employees who allegedly forced her to retire from her position as Curator of the Fort Sheridan Museum at Fort Sheridan, Illinois.

In finding that the individual defendants had not demonstrated "special factors counselling hestitation" the Seventh Circuit Court stated at 650 F.2d 904, 907.

> They do not enjoy 'such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate' and because even if requiring them to defend [plaintiff's] suit might inhibit their efforts to perform their official duties, their qualified immunity provides adequate protection for them. (citing *Carlson vs. Green*, 100 S. Ct. at 1472.)

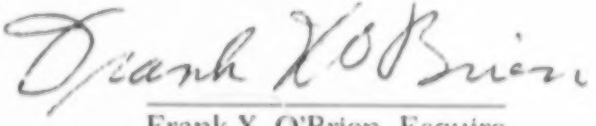
Such holding is directly opposite to that of the Third Circuit's herein and the Fifth Circuit in *Bush vs. Lucas*, 647 F.2d 573 (1981), where those latter Circuit Courts have found a "special factor counselling hestitation" in the relationship between the federal government as employer and its employees.

Certainly, to afford federal civilian employees a constitutionally based mode of relief in one sector of the country while to withhold it in others on the ground that the status of the government as employer is all-controlling denies those unsuccessful federal employee litigants basic equal protection to which all citizens, irrespective of their occupational calling, are entitled.

CONCLUSION

Based upon the foregoing, it is clear that should this Court deny the within Petition for Certiorari, a segment of the population, to wit, federal civilian employees will be compelled and forced to submit to violations of their constitutionally protected rights at the hands of their co-employees and supervisors, with never an opportunity to gain adequate redress or relief from continuing transgressions.

THEREFORE, this Petition for writ of certiorari should be granted.



Frank X. O'Brien, Esquire
Attorney for Petitioner

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1187

Purtill, James R.,

Appellant

v.

Harris, Patricia Roberts, Secty Dept. of Health & Human Services; Mellody, James F. Principal Reg. Official Dept. of Health and Human Services; Bryant, Everett, Reg. Administrator Health Care Financing Administration; Griffith, Robert L. Senior Program Officer Office of the Reg. Administrator Health Care Financing Administration; Kennedy, Thomas J., Chief Reg. Personnel Office, Dept. of Health and Human Services; Hartman, Maurice, Office of the Principal Regional Official; Carty, Alwyn L., Acting Reg. Medicare Director; Jesse, Jr., Hampton D., Director of Program Management Medicare Reg. Off.; Watson, Dorothy J. Supervisory District Office and Professional Groups Specialist Medicare Regional Office

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 80-3311)

Argued August 4, 1981

Before: ALDISERT and WEIS, *Circuit Judges*, and RE, *Chief Judge*.*

(Filed August 24, 1981)

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*Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

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OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

The first question for decision presented by this appeal by a federal employee from the district court's grant of summary judgment for the government defendants is whether section 15 of the Age Discrimination in Employment Act, 29 U.S.C. §633a, preempts judicial remedies based directly on the Constitution for claims of age discrimination in federal employment. We also must decide whether a plaintiff bringing an action under section 15 of the ADEA must exhaust the administrative remedies he has chosen to pursue before filing suit. The district court held that the ADEA provides the exclusive judicial remedy for the plaintiff's claims of age discrimination and that once the plaintiff initiated a proceeding for administrative relief, he was required to exhaust his administrative remedies as a prerequisite to his ADEA suit. We affirm, but we remand to the district court to allow the appellant an opportunity to amend his complaint with an allegation supporting his claim that he has exhausted his administrative remedies under the ADEA, at least as to one complaint.

I.

The plaintiff below, James Purtill, is fifty-three years of age and is employed by the Social Security Administration in the Department of Health and Human Services at its Philadelphia office. On two occasions Purtill's superiors failed to promote him from his position as Professional Group Specialist (GS-12) in the Medicare Regional Office to a position as a Medicare Contractor Operations Specialist (GS-13). After each incident, Purtill filed a complaint with HHS alleging that he was denied the promotions because of his age. The depart-

ment denied both of his complaints and he pursued two separate administrative appeals to the Equal Employment Opportunity Commission.[1] Purtill then filed the present suit in federal district court, proceeding on two theories. Count one of his complaint was brought against HHS and demanded relief under the ADEA. In addition to a statement of the facts underlying his two administrative complaints, Purtill alleged that 180 days had passed since he had initiated those proceedings. Count two was brought against certain named individuals, all of whom are supervisory officials at HHS' Philadelphia Regional Office, and asked for legal and equitable relief directly under the Constitution, *see Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and under 42 U.S.C. §§1985 and 1986. The thrust of the allegations in this count was that Purtill was subjected to retaliatory harassment in violation of his fifth amendment rights for filing age discrimination complaints. The district court granted the defendants' motion for summary judgment, concluding on count one that the plaintiff had failed to exhaust his administrative remedies and on count two that the amendment of the ADEA extending coverage to federal employees preempted constitutional *Bivens* remedies.[2] *Purtill v. Harris*, No. 80-3311 (E.D.Pa. December 16, 1980).

II.

In analyzing the *Bivens* claim, the district court applied the principle that a right of action under the Constitution will not be implied where effective alternative forms of relief are available and accepted the reasoning

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1. The EEOC in 1978 was delegated authority to decide age discrimination in employment complaints under section 15 of the ADEA formerly handled by the Civil Service Commission. *See* 43 Fed. Reg. 19807 (1978); 29 C.F.R. §§1613.501-1613.521.

2. The appellant does not raise, and we therefore do not consider, the dismissal of his 42 U.S.C. §§1985 and 1986 claims on appeal.

set forth in *Christie v. Marston*, 451 F.Supp. 1142 (N.D.Ill. 1978), and *Paterson v. Weinberger*, 644 F.2d 521 (5th Cir. 1981). The appellees argue that unlike the situations where a *Bivens* claim has been upheld, the statutory remedial scheme here provides the plaintiff with complete and efficient remedies. *Compare Carlson v. Green*, 446 U.S. 14 (1980) (Federal Tort Claims Act not considered effective or complete); *Davis v. Passman*, 442 U.S. 228 (1979) (Congressional employee claiming sex discrimination not covered by Title VII); *Bivens* (state remedies for invasions of privacy by federal agents inadequate).

The appellant contends that *Carlson v. Green* compels a different result, stressing the following passage in the Court's opinion:

> *Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396; *Davis v. Passman*, 442 U.S. 228, 245 (1979). The second is when defendants show that Congreses has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective. *Bivens, supra*, at 397; *Davis v. Passman*, 442 U.S. at 245-247.

446 U.S. at 18-19 (emphasis in original). He concludes that this passage indicates a presumption that there is a constitutional remedy applicable to his claim parallel to his statutory rights. We find evidence both of Congressional intent that section 15 of the ADEA be a substitute for other remedies and of factors counselling hesitation in implying a right of action.

Defendants need not show that Congress recited any magic words to demonstrate that the statutory remedy was intended to be exclusive; rather, the inquiry at this stage is limited to a determination of Congressional intent. *Id.* at 19 n.5. In *Brown v. GSA* 425 U.S. 820, 829 (1976), the Court concluded that the remedies available to federal employees for racial discrimination under section 717 of the Civil Rights Act, 42 U.S.C. §2000e-16, were intended to be "exclusive" and "preemptive." *See also Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 376 (1979); *Davis v. Passman*, 442 U.S. 228, 247 n.26 (1979). The Court based this determination on both the legislative history and an examination of "the balance, completeness, and structural integrity" of section 717 and Title VII. *Brown*, 425 U.S. at 828, 832. Immediately after *Brown* was decided, this court held that a federal employee was precluded by the holding in *Brown* from asserting *Bivens* claims against agency officials for racial discrimination in federal employment. *Gissen v. Tackman*, 537 F.2d 784 (3d Cir. 1976) (per curiam) (in banc).

These cases are directly relevant to Purtill's age discrimination claim. Section 15 of the ADEA was modeled after section 717 of the Civil Rights Act of 1964. *See Lehman v. Nakshian*, U.S. , , 49 U.S.L.W. 4835, 4837 (June 16, 1981). Recognizing the similarity of purpose of the ADEA and Title VII, the Supreme Court has instructed that when the legislative history indicates that the source of a section in the ADEA was a complementary section in Title VII, the two statutes are to be construed consistently. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979). Moreover, we are unwilling to say that Congress' intent in enacting section 15 of the ADEA could in this respect differ from its intent in amending Title VII to protect federal employees. We conclude, therefore, that Congress intended section 15 of the ADEA to preempt *Bivens* remedies arising out of age discrimination claims by federal employees, and we

too accept the reasoning set forth in *Paterson v. Weinberger*, 644 F.2d at 524-25, and *Christie v. Marston*, 451 F.Supp. at 1145-47.

In addition to congressional intent, we also conclude that special factors exist counselling hesitation before recognizing a *Bivens* remedy in an age discrimination case. In an analogous context, the fifth circuit has recently observed that "[t]he role of the Government as an employer toward its employees is fundamentally different from its role as a sovereign over private citizens generally." *Bush v. Lucas*, 647 F.2d 573, 576 (5th Cir. 1981) *on remand from* 446 U.S. 914 (1980) (reconsideration in light of *Carlson v. Green*). There the court reaffirmed its position that in light of available civil service remedies a federal employee has no cause of action for damages under the first amendment for retaliatory demotion. That decision was guided by "the well established rule that the government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.' " *Sampson v. Murray*, 415 U.S. 61, 83 (1974) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961)). *See also Arnett v. Kennedy*, 416 U.S. 134, 168 (Powell, J., concurring) ("the Government, as an employer, must have wide discretion and control over the management of its personnel. . . .") We therefore hold that in light of the existence of ADEA remedies the employer-employee relationship in this case is a special factor that counsels hesitation in recognizing a constitutional cause of action absent affirmative contrary indications from Congress.[3]

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3. We have assumed arguendo that the complaint sets forth facts which, if established, would have sustained a finding that appellant's constitutional rights were violated. Neither in his brief nor in his argument before this court was appellant's counsel able to articulate the constitutional violation or violations underlying this count of his complaint. Whether the pleadings are sufficient in this regard is immaterial to our decision.

III.

The district court was also correct — on the basis of the pleadings before it — in dismissing the two separate ADEA claims set forth in count one because Purtill had failed to exhaust his administrative remedies. A federal employee protected by the ADEA has two options when presenting a claim of age discrimination connected with his job. He may forego administrative action and file suit in federal district court after giving the EEOC thirty days' notice of intent to sue. 29 U.S.C. §633a(d). Alternatively, he may file a complaint with the EEOC and commence suit following its determination should he be dissatisfied with the EEOC's disposition. 29 U.S.C. §633a(c). Purtill, however, has attempted in count one to pursue both routes simultaneously. Before filing this suit, he filed two complaints with HHS — one for each denial of promotion to GS-13 — which, according to EEOC regulations, were deemed filed with the EEOC. 29 C.F.R. §§1613.511, 1613.214. Purtill thereafter proceeded to federal court and filed the present suit before the EEOC took final action on either of his complaints.

At the outset, we reject Purtill's contention that he is excused from his failure to exhaust administrative remedies because 180 days have passed since he filed his administrative complaints. Were this a Title VII claim we would agree with his position because 42 U.S.C. §2000e-16(c) provides that a plaintiff may proceed to district court 180 days after filing a complaint with the EEOC. Conspicuously absent from the corresponding section of the ADEA, 29 U.S.C. §633a(c), is a similar provision allowing suit in the absence of a final decision by the EEOC. Although we have found no legislative history that reveals the reason why this difference exists, we are persuaded that it was intentional. Obviously when a plaintiff may avoid administrative avenues of relief entirely by filing suit in district court after notice of intent to sue, 29 U.S.C. §633a(d), some of the

usual reasons for requiring exhaustion of administrative remedies do not apply. Nevertheless, in addition to evident congressional intent we note pragmatic, prudential reasons for such a requirement. Allowing a plaintiff to abandon the administrative remedies he has initiated would tend to frustrate the ability of the agency to deal with complaints. All participants would know that at any moment an impatient complainant could take his claim to court and abort the administrative proceedings. Moreover, such a course would unnecessarily burden courts with cases that otherwise might be terminated successfully by mediation and conciliation. Absent an indication of contrary congressional intent, we will not countenance circumventing the administrative process in this manner. *See also Hall v. United States*, 436 F.Supp. 505, 507-08 (D.Minn. 1977); *Trammel v. Callaway*, 415 F.Supp. 212, 216 (N.D. Miss. 1976).

Although we find no error in the district court's disposition of count one, we are informed by the appellant that his administrative complaint based on the first denial of promotion was decided adversely to him on December 4, 1980. *See* app. at 145. The appellant did not amend his pleadings to reflect this change in status. If, as Purtill insists, this EEOC decision exhausts his avenues of administrative relief, then the factual predicate underlying the district court's dismissal no longer existed for the claim based on the first denial of promotion set forth in count one when its order was entered on December 16, 1980. HHS does not contend otherwise. We therefore will remand this proceeding to the district court. On remand, the appellant will have an opportunity to amend his complaint with an allegation that he has exhausted his administrative remedies on that portion of count one relating to the denial of promotion to the first vacancy he sought.[4]

4. We note that counsel for HHS informed this court at oral argument that HHS would not object to a motion to amend for purposes of claiming exhaustion and that the department considers the district court's dismissal of count one to have been without prejudice.

For the foregoing reasons, the judgment of the district court will be affirmed and the case will be remanded to the district court for proceedings consistent with the foregoing.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES R. PURTILL	:	CIVIL
	:	ACTION
v.	:	
	:	
PATRICIA ROBERTS HARRIS,	:	
Secretary of Health and	:	
Human Services, et al.	:	NO. 80-3311

MEMORANDUM AND ORDER

Newcomer, J. December 1 , 1980.

Defendant moves for dismissal, or summary judgment, alleging that plaintiff has failed to exhaust his administrative remedies and that Count II of the complaint states claims upon which relief cannot be granted.

Plaintiff is a 53 year-old employee of the Department of Health and Human Services, ("DHHS"), who claims in Count I that defendant failed to promote him from his position as Professional Groups Specialist in the Medicare Regional Office (which is a GS-12 position) to Medicare Contractor Operations Specialist (which is a GS-13 position) because of his age. The office of Equal Employment opportunity of DHHS ("EEO") concluded that "the evidence of record does not support a finding of age discrimination." Plaintiff was notified of this decision by a letter, and he was informed of his right to appeal to the Office of Review and Appeals.

Plaintiff also alleges that individual defendants have harassed and intimidated him because of his discrimination complaints. This harassment took the form of increased work loads, poor work appraisals, and criticism. Plaintiff alleges that these actions violated the constitution, and the civil rights laws.

Plaintiff seeks injunctive relief, damages, retroactive promotion with back pay, liquidated damages, damages for time spent on his EEO complaint, expungement of files, and the implementation of an affirmative action plan in the Medical Regional Office. Plaintiff also seeks injunctive relief against the individual defendants, as well as compensation and punitive damages in the amount of $250,000 from each individual defendant.

Age discrimination in federal employment is clearly forbidden. 29 U.S.C. §633a. The Equal Employment Opportunity Commission is empowered to enforce the Age Discrimination in Employment Act ("ADEA") but federal employees may also sue in federal court. The issue here is whether plaintiff, having initially proceeded through the EEO and having failed to pursue his appeal there, may commence an action in this Court.

The government cites several cases for the proposition that "[a] prospective plaintiff has the option of either proceeding directly to Federal Court after giving the Civil Service Commission . . . appropriate notice of intent to sue, or of filing a complaint initially with the Commission and commencing suit only after dispositon of the complaint." *Hall v. United States*, 436 F.Supp. 505, 507-508 (D.Minn. 1977) (federal employee is entitled to trial de novo after failing to secure remedy through administrative process). In *Trammell v. Calloway*, 415 F.Supp. 212 (N.D. Miss. 1976), a case directly on point, the court held that "plaintiff's failure to pursue his administrative appeal prevents this court from granting relief on the claim." *Trammell* at 216.

As in *Trammell*, plaintiff here assets that further appeal to the EEOC would be futile. In fact, plaintiff, through counsel, states that "[t]he cynical, autocratic management echelons have driven justice 'out of currency' by their erection of complex and numerous procedural high hurdles, paper ramparts of memoranda and progressively wider and deeper trenches (the last one manned by the U.S. Attorney)." With all due recognition

of the complexities of administrative procedures, the Court accepts the rationale of *Trammell*, that considerations of judicial efficiency and administrative efficacy, *Trammell* at 216, will prevail unless plaintiff can show "a genuinely futile administrative effort," *Trammell* at 217, *quoting Penn v. Schlesinger*, 490 F.2d 700, 712 (1973) (dissent) *rev'd.* 497 F.2d 970 (5th Cir. 1974) (en banc, dissent adopted). Plaintiff's age discrimination claims will therefore be dismissed for failure to exhaust administrative remedies.

Defendant's preemption argument has merit, and plaintiff's claims against individual defendants brought under the civil rights laws and the Constitution will be dismissed for failure to state a claim upon which relief can be granted. *Platt v. Burroughs*, 424 F.Supp. 1329 (E.D.Pa. 1976). *See Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979); *Brown v. General Services Administration*, 425 U.S. 820 (1976). This Court will decline to find an implied private right of action under the Constitution where effective alternative forms of relief are available. *See Neely v. Blumenthal*, 458 F.Supp. 945, (D.D.C. 1978).

Because affidavits accompany the pleadings in this case, the motion will be treated as one for summary judgment, and an appropriate order will be entered.

Clarence C. Newcomer, J.

APPENDIX C

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Plaintiff		
JAMES R. PURTILL 6411 Drexel Road Philadelphia, PA	:	CIVIL ACTION
v.	:	
Defendants	:	
PATRICIA ROBERTS HARRIS, Secretary, Department of Health and Human Services Mary E. Switzer Building 330 Independence Avenue, S.W. Washington, D.C. 20201	:	
JAMES F. MELLODY Principal Regional Official Department of Health and Human Services Gateway Building, Rm. 11,000 3535 Science Center Philadelphia, PA 19101	:	PLAINTIFF DEMANDS A JURY TRIAL
EVERETT F. BRYANT Regional Administrator Health Care Financing Administration Gateway Building, Rm. 3111 Philadelphia, PA	:	

ROBERT L. GRIFFITH
Senior Program Officer
Office of the Regional Administrator
Health Care Financing Administration
Gateway Building, Rm. 3111
Philadelphia, PA

THOMAS J. KENNEDY, CHIEF
Regional Personnel Office
Department of Health and
Human Services
Room 9000
Gateway Building
Philadelphia, PA

MAURICE HARTMAN
Office of the Principal Regional
Official
Room 11,000
Gateway Building
Philadelphia, PA

ALWYN L. CARTY
Acting Regional Medicare Director
Room 10140
Gateway Building
Philadelphia, PA

HAMPTON D. JESSE, JR.
Director,
Division of Program Management
Medicare Regional Office
Room 10140
Gateway Building
Philadelphia, PA

DOROTHY J. WATSON :
Supervisory District Office and :
Professional Groups Specialist :
Medicare Regional Office :
Room 10200 :
Gateway Building :
Philadelphia, PA :

COMPLAINT

1. This is an action brought pursuant to the Age Discrimination in Employment Act (ADEA) of 1967, as Amended; 29 U.S.C.A., Sec. 621 et seq., based on age discrimination against plaintiff. Plaintiff is an employee of the Executive Branch of the Federal Government and alleges pursuant to 29 U.S.C.A. Sec. 631(a) that he was denied promotion within the Department of Health and Human Services, his employer, on account of his age. Plaintiff is an employee within the protected class between age forty (40) and age seventy (70) bracket of the aforementioned section. This action is also based on the Executive Order #11,478 and the Rules and Regulations of the Department of Health and Human Services.

2. Plaintiff also brings this action against certain named Federal employees for tortious and other improper conduct which was ultra vires and in violation of his rights and the rights of persons in his class for which plaintiff seeks equitable relief and damages. The plaintiff alleges that the hereinafter named persons in Count II violated his rights under the U.S. Constitution and are liable for damages under 42 U.S.C.A., sections 1985 and 1986. Further, the said defendants violated the Rules and Regulations of the "Department" prohibiting retaliatory conduct against any employee who files an EEO Complaint.

3. Plaintiff invokes the jurisdiction of this court pursuant to 29 U.S.C.A. Sec. 633a(c), 28 U.S.C.A. Sec.

1343, 28 U.S.C.A. Sec. 1331, plaintiff is entitled to and demands a jury by trial.

4. The Department of Health and Human Services is an agency within the Executive Branch of the Federal Government. The said agency will hereinafter be identified and referred to by the term "Department". Patricia Roberts Harris is the Secretary of the "Department."

5. Plaintiff was employed by the "Department" as a GS-6 in the Social Security Administration is 1957 and, after a number of diverse job assignments, was eventually promoted to a GS-12 grade as a Staff Assistant in the Medicare Regional Office of the "Department" in March, 1973 and has continued in that position to the present.

STATEMENT OF CLAIM

COUNT I

6. The Plaintiff has filed two (2) Equal Employment Opportunity Complaints on the grounds that he had been discriminated against by the granting of promotions to other employees on two (2) occasions. The said complaints (Complaint of Discrimination in Federal Government) were filed on November 7, 1978, and May 12, 1979, respectively.

7. More than one hundred and eighty (180) days have elapsed from the time of the filing of both complaints without any final administrative decisions having been rendered thereon by the "Department".

8. As to the first EEO Complaint, on or about August 14, 1978, the Philadelphia Regional Personnel Office acting for the Medicare Regional Office posted a Vacancy Announcement No. 78-215, advertising the availability of two (2) Medicare Contractor Operations Specialist (GS-105-13) positions in the said Medicare Regional Office.

9. Plaintiff applied for a promotion under the said Vacancy Announcement, since he aspired to advance into a higher grade and since he had previously worked in the same field and performed all of the duties of the advertised positions for a period of two (2) full years.

10. Plaintiff, by virtue of his general experience in the "Department" and specific experience in the precise duties of the available positions, was the person most qualified to be promoted to the aforementioned position.

11. On September 28, 1978, Plaintiff received notice that although he was on the "best qualified list," the vacancies had been filled by Anthony Hrincevich and Catherine McCoy. The said selectees were aged thirty-four (34) and thirty-two (32) respectively.

12. The appointing official was Maurice Hartman, formerly Regional Medicare Director, who made the selection after conferring with Robert L. Griffith, former Director of Division of Program Operations.

13. On September 28, 1978, when these contested selections occurred, Plaintiff was fifty-one (51) years of age.

14. Plaintiff avers that in failing to select Plaintiff for promotion to one of the aforesaid positions, the "Department" through its employees discriminated against plaintiff solely on the basis of age. But for Plaintiff's age, he would have been selected and would have received all the benefits of the higher grade.

15. As to the Second EEO Complaint, on or about January 19, 1979, the Philadelphia Regional Personnel Office acting for the Medicare Regional Office posted Vacancy Announcement No. 79-10 advertising the availability of the position of Medicare Contractors Operations Specialist (GS-105-13) in the said Medicare Regional office. The number of vacancies was not specified in the Vacancy Announcement.

16. Plaintiff applied for the position for the same reasons as hereinbefore described in paragraphs 9 and 10 above.

17. Although the Vacancy Announcement did not indicate the number of positions open, three men were in fact promoted. They were Peter Goodman, aged twenty-nine (29), Patrick Kiley, aged thirty (30), and Frank Sapp, aged fifty-five (55). Plaintiff, when notified of the appointments, was informed that he had been on the "best qualified list" for these positions.

18. The appointment officer was Maurice Hartman, formerly Regional Medicare Director, who issued a memo dated March 6, 1979, naming the selectees. Everett F. Bryant, Regional Administrator, Health Care Financing Administration, was Maurice Hartman's superior and allowed the selections as hereinbefore described although the promotions and the procedures violated the rules and regulations of the "Department" on Vacancy Announcements; the selections process; and unlawfully condoned and approved an additional vacancy, and the additional promotion thereunder for the improper purpose of fabricating and inventing a defense to plaintiff's first EEO Complaint based on age discrimination.

19. Management officials, James F. Mellody, Principal Regional Official, Department of Health and Human Services, Everett S. Bryant, Regional Administrator, Health Care Financing Administrator, Maurice Hartman, former Director, Division of Program Operations, Alwyn L. Carty, Acting Regional Medicare Director, Robert L. Griffith, former Director of Division Program Operations, and Hampton D. Jesse, Jr., Director, Division of Program Management, in the Medicare Regional Office and its predecessors, under various designations, have followed a course of discrimination against the employees therein based upon age through the above described promotions. The records for promotions in the Medicare Regional Office will demonstrate a pattern and practice of rejecting a disproportionate number of applicants who are over the age of forty (40). Further, the said officials of the Medicare Regional Office have

failed to establish an AFFIRMATIVE ACTION PROGRAM by filing and implementing an AFFIRMATIVE ACTION PLAN in accordance with the directives of Executive Order #11,478 issued 1969, and Federal Statutes relating to discrimination based on age as well as other grounds. The derelictions of which plaintiff complains consist of both intentional discrimination based on age and the failure to affirmatively consider age as a positive factor pursuant to a mandated AFFIRMATIVE ACTION Program and Plan.

20. Plaintiff avers that the Federal employees identified in Paragraph 19 above individually and in concert with one another, caused, allowed and condoned improper procedures for Vacancy Announcements; employee appraisals; pre-selection in promotions; and discriminatory promotions; and said Federal employees failed to exercise supervision and review of the next subordinate or subordinates relative to the improper conduct as hereinbefore described.

21. Plaintiff avers that Thomas J. Kennedy, Chief, Philadelphia Regional Personnel Office, has failed to implement an AFFIRMATIVE ACTION PLAN; has permitted unlawful and improper procedures to exist in the annual employee appraisal program and the promotional program as previously set forth; has sanctioned and failed to act in the unlawful barring from promotion of plaintiff on the basis of age; has been derelict in being unwilling to correct unlawful use of annual employee appraisals for the pre-selection of persons for promotion; has permitted the issuance of an improper Vacancy Announcement No. 79-10, January 19, 1979; and, generally failed to exercise the authority of his office in correcting abuses in the promotion process.

WHEREFORE, Plaintiff demands judgment against the "Department" as follows:

(a) permanently enjoining "Department" and its employees from discriminating against plaintiff by denying him promotion on the basis of age;

(b) requiring that the "Department" immediately promote plaintiff as a Medicare Contractor Operations Specialist with a grade no lower than GS-13 as is commensurate with the ability, experience and education of the plaintiff and which he would have attained but for the discriminatory employment practices complained of herein;

(c) awarding plaintiff back pay and all the other benefits to which he would have been entitled had he not been discriminated against from the 28th day of September, 1978 to the present;

(d) awarding plaintiff an equal amount of pay and benefits as described in (c) above as liquidated damages;

(e) direct the "Department" to compensate plaintiff by granting him either monetary payment according to a GS-13 rating or compensatory duty time for all the hours actually required by him to devote to the preparation of the EEO Complaints and the evidence gathered to prove the grounds for the complaints;

(f) awarding Plaintiff his court costs and the reasonable attorney's fees which he incurred in seeking legal assistance in the filing of his EEO Complaints, preparation of his grievances, the preparation of his evidence in support of the same, and in the preparation of his statements and replies in response to the administrative proceedings concerning his complaints and grievances; and,

(g) that the "Department" be required to expunge any unfavorable formal or informal personnel records of the plaintiff as well as the unlawful and retaliatory annual employee appraisals filed subsequent to Plaintiff's first EEO Complaint.

COUNT II

22. Plaintiff avers that because he had filed the two (2) hereinbefore described EEO Complaints, based on age discrimination, certain Federal employees undertook individually and in concert with one another to retaliate by means of harrassment and intimidate Plaintiff by unlawful conduct outside of the scope of their employment in order to deprive the Plaintiff of his rights in direct violation of the rules and regulations of the "Department," Executive Orders and Federal Statutes and the U.S. Constitution.

23. Plaintiff seeks monetary redress against the said Federal employees individually for their personal misconduct regarding Plaintiff's employment; his future prospects for advancement in his employment; for the distress and daily mental and physical anguish over a two (2) year period caused by the wilful and vindictive behavior of the said Federal employees who are hereinafter identified; for their efforts to deny him his rights as an employee and citizen of the United States; recompense for personal time required to be expended in the preparation of the EEO Complaints based on age discrimination and grievances occasioned by the unlawful acts of the said Federal employees; by way of retaliation for the expenditure of Plaintiff's personal funds required to obtain the services of counsel to represent him since the filing of the first EEO Complaint and in attempting to resist the intimidation and harrassment.

24. Plaintiff avers that the hereinafter named defendants conspired to deprive employees under forty (40) years of age generally, and plaintiff in particular, from obtaining a promotion and thereby enjoying a right to promotion (if otherwise qualified) which right was intended to be available to all Federal employees regardless of age. The conduct of said defendants was based on an invidiously discriminatory annimus against that class of subordinate Federal employees over forty (40) years of

age who attempted to obtain promotions and the Plaintiff in particular.

25. Plaintiff avers that defendant, James F. Mellody, Principal Regional Official, Department of Health and Human Services, neglected to supervise and control his subordinates, the co-defendants, Everett F. Bryant, Regional Administrator, Health Care Financing Administrator, former Director, Division of Program Operations, Maurice Hartman, formerly Medicare Regional Director, Alwyn L. Carty, Acting Regional Medicare Director, Robert L. Griffith, former Director of Program Operations, Hampton D. Jesse, Jr., Director, Division of Program Management, Dorothy J. Watson, Supervisory District Office and Professional Groups Specialist, by permitting discrimination against Plaintiff by and failing to prevent the retaliation by means of intimidation and harrassing conduct practiced by his said subordinates against Plaintiff.

26. Plaintiff avers that defendant, Everett F. Bryant, Regional Administrator, Health Care Financing Administration, actively and tacitly participated in and approved of the intimidation and harrassment of Plaintiff through supervisors over which the said defendant had authority; and, by the personal intimidation and harrassment by said defendant, who, through a representative, offered a transfer to Plaintiff provided Plaintiff would withdraw his EEO Complaints (which Plaintiff refused to do) and then later, when the harrassment increased in intensity and diversity, defendant refused plaintiff's request for a transfer.

27. Plaintiff avers that defendant, Maurice Hartman, formerly Regional Medicare Director, with the intent and purpose of instigating retaliation in order to intimidate and harrass the Plaintiff for filing EEO Complaints caused an annual employee appraisal to be given Plaintiff without consultation with Plaintiff's previous supervisor in rendering an annual employee appraisal; caused the down-grading of the Plaintiff's employee ap-

praisal; further criticised Plaintiff for filing EEO Complaints; initiated and approved of continuing harrassment and intimidation of Plaintiff by means of increasing the Plaintiff's work load; and procuring a vindictive surveillance and other means of retaliation against Plaintiff through said defendant's subordinate, defendant, Dorothy J. Watson.

28. Plaintiff avers that defendant, Alwyn L. Carty, Acting Regional Medicare Director, who succeeded Maurice Hartman, has continued the unlawful conduct described in Paragraphs 24 to 26 inclusive above by failing to curtail the retaliatory conduct of his subordinates and by participating in the unlawful harrassment and intimidation by his subordinates toward the Plaintiff and by said defendant's refusal, on mere technical grounds, to consider Plaintiff's grievances in response to such misconduct.

29. Plaintiff avers that defendant, Robert L. Griffith, formerly Director, Division of Program Operations, participated in the promotion discrimination against Plaintiff and the misconduct described in Paragraphs 24 to 27.

30. Plaintiff avers that defendant Hampton D. Jesse, Jr., Director, Division of Program Management, engaged in unlawful retaliation and harrassment against Plaintiff after the latter filed EEO Complaints by refusing a timely annual employee appraisal which would have required that the Plaintiff's prior supervisor be consulted in the preparation thereof; participated with others in the downgrading of the Plaintiff's employee appraisals as a means of retaliation; addressed derogatory remarks to Plaintiff concerning the latter's age; articulated unfounded criticism of Plaintiff's work performance and instigated and approved similar conduct on the part of his subordinate defendant, Dorothy J. Watson.

31. Plaintiff avers that defendant, Dorothy J. Watson, Supervisor, District Office and Professional George

(a) permanently enjoin all of the named individual defendants from discriminating against Plaintiff and those in the same class of age forty (40) to age seventy (70) in the terms and conditions of his and their employment on the basis of his and their age;

(b) to implement an AFFIRMATIVE ACTION PLAN in regard to age in the Medicare Regional Office as authorized by statute and directed by Executive Order;

(c) to render judgment against each and every one of the defendants, James F. Mellody, Everett F. Bryant, Maurice Hartman, Robert L. Griffith, Alwyn L. Carty, Hampton D. Jesse, Jr., and Dorothy J. Watson, by way of compensatory and punitive damages in the sum of $250,000.00 for the mental and physical anguish, pain and suffering which the Plaintiff has endured from the discriminatory conduct of the individual defendants in respect to denying him promotions on the basis of age and in compensation for the retaliation by means of intimidation and harrassment inflicted upon the Plaintiff over a two-year period by reason of the two (2) EEO Complaints which he filed;

(d) that the employee appraisals given him by the defendants after Plaintiff filed his first EEO Complaint be vacated, declared null and void and be expunged from the personnel records of the Plaintiff;

(e) and that the Court award Plaintiff all other relief which is necessary and proper to equitably remedy the individual misconduct of the defendants to which the plaintiff has been subject.

Respectfully submited,

FRANK X. O'BRIEN
Attorney for Plaintiff

Specialist, has individually and with her superiors engaged in a retaliatory plan of continuing intimidation and harrassment against the Plaintiff in response to his filing the EEO Complaints hereinbefore described; that defendant has denied the Plaintiff adequate on-duty time to prepare the material for administrative investigations of his complaints and grievances in order to frustrate Plaintiff's efforts to obtain redress; that she has engaged in extra-ordinary and unwarranted surveillance of Plaintiff's work activity, solely for the purpose of harrassment and intimidation; has given Plaintiff an excessive workload and acted as the instrument of her superiors to punish Plaintiff both for his EEO Complaints and the grievances he has filed in response to the hereinbefore described intimidation and harrassment.

32. Plaintiff further avers all the foregoing defendants violated their responsibility as managers by failing to implement an AFFIRMATIVE ACTION PLAN as required by EEOC legislation and "Department" regulations, and Executive Directives and Orders; that in acting outside the scope of their employment with the Federal government they conspired against all subordinate employees as a class under forty (40) years of age to prevent any from obtaining a promotion; that when Plaintiff filed this EEO Complaints they conspired against Plaintiff in particular to bar his promotion and to award an improper promotion to screen their misconduct; and that in descending order from defendants, James F. Mellody, Everett F. Bryant, Maurice Hartman, Alwyn L. Carty, Robert L. Griffith and Hampton D. Jesse, Jr., had power and authority to prevent and terminate the retaliatory conduct of the part of their immediate subordinates but each not only failed to do so but rather fully participated therein and abetted one another in such unlawful conduct.

WHEREFORE, Plaintiff demands judgment against the defendants as follows:

APPENDIX D

THE U.S. CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE III.

SECTION I. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES STATUTES INVOLVED

28 §1331. FEDERAL QUESTION; AMOUNT IN CONTROVERSY; COSTS

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or

value shall be required in any such action brought against the United States, any agency, thereof, or any officer or employee thereof in his official capacity.

28 §1343. CIVIL RIGHTS AND ELECTIVE FRANCHISE

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person.

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(As amended Sept. 3, 1954, c. 1263, §42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part II, §121, 71 Stat. 637; Dec. 29, 1979, Pub.L. 96-170, §2, 93 Stat. 1284.

29. §633a. NONDISCRIMINATION ON ACCOUNT OF AGE IN FEDERAL GOVERNMENT EMPLOYMENT — CIVIL SECTION' JURISDICTION; RELIEF

(a) All personnel actions affecting emloyees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal equitable relief as will effectuate the purposes of this chapter.

28 §1254. COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following method:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment of decree;

Opposition

Office - Supreme Court, U.S.
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No. 81-1010

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES R. PURTILL, PETITIONER

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 15 of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633a, preempts judicial remedies based directly on the Constitution for claims of age discrimination in federal employment.

2. Whether, in light of the existence of ADEA remedies, the federal employer-employee relationship in this case is a special factor that counsels hesitation in recognizing a constitutional cause of action absent affirmative contrary indications from Congress.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-10) is reported at 658 F. 2d 134. The opinion of the district court (Pet. App. A-11 to A-13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1981. The petition for a writ of certiorari was filed on November 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a GS-12 Professional Group Specialist in the Medicare Regional Office of the Social Security Administration, Department of Health and Human Services, filed complaints with HHS on two occasions when his superiors promoted persons other than himself to a GS-13 position as Medicare Contractor Operations Specialist (Pet. App. A-3). Petitioner was 51 years old when those promotions occurred, and he asserted that he had been denied the promotions on the ground of his age (*id.* at A-3, A-18). HHS denied the complaints, and petitioner appealed each denial to the Equal Employment Opportunity Commission, pursuant to regulations implementing Section 15 of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633a (Pet. App. A-4 & n.1).

Without waiting for the EEOC to act on his appeals, petitioner filed the present suit in the United States District Court for the Eastern District of Pennsylvania challenging the promotion decisions on two separate theories: In Count I of his complaint petitioner demanded relief against HHS under the ADEA; and in Count II he sought legal and equitable relief, based on the United States Constitution, from seven named officials in the HHS Philadelphia regional office for allegedly denying him promotions on the ground of his age and harassing him in retaliation for his filing of the promotion complaints (Pet. App. A-4, A-8, A-14 to A-26).[1]

2. The district court granted respondents' motion for summary judgment, concluding that petitioner had failed to exhaust administrative remedies as to his claims in Count I

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[1]Petitioner also asserted claims under 42 U.S.C. 1985 and 1986, but those were dismissed by the district court and were not included in petitioner's appeal (Pet. App. A-4 n.2).

and that his constitutional claims in Count II were pre-empted by the ADEA (Pet. App. A-11 to A-13).

3. The court of appeals affirmed (Pet. App. A-1 to A-10). Applying the standard set forth by this Court in *Carlson* v. *Green*, 446 U.S. 14, 18-19 (1980), the court of appeals concluded that a constitutional cause of action on the theory of *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), is not available in this case because there is "evidence both of Congressional intent that section 15 of the ADEA be a substitute for other remedies and of factors counselling hesitation in implying a right of action" (Pet. App. A-5).[2]

The court of appeals noted (Pet. App. A-6) that under *Carlson*, Congress need not have recited any specific words to manifest its intent that the statutory remedy be exclusive. 446 U.S. at 19 n.5. Rather, the court observed, the determination of intent may be based on an examination of both the legislative history and the " 'balance, completeness, and structural integrity' " of the legislative remedy. Pet. App. A-6, quoting *Brown* v. *GSA*, 425 U.S. 820, 832 (1976). Examining the relevant legislative history, the court of appeals noted (Pet. App. A-6) that the ADEA's provision for coverage of federal employees is modeled closely upon the similar provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, which this Court in *Brown* v. *GSA*, *supra*, held to be the exclusive remedy for federal employees complaining of race discrimination in employment. In view of the statement in *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979), that corresponding sections of Title VII and the ADEA are to be construed consistently where the ADEA section has its source in Title VII,

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[2]The court of appeals remanded petitioner's ADEA claim to the district court to allow him to amend the complaint to allege exhaustion of remedies as to the first denial of promotion (Pet. App. A-9). Petitioner does not here challenge the disposition of his ADEA claims.

the court of appeals concluded that the ADEA was similarly intended to be the exclusive remedy for claims of age discrimination in federal employment (Pet. App. A-6 to A-7).

The court of appeals further concluded (Pet. App. A-7) that special factors present in the federal employment relationship counsel hesitation in implying a *Bivens* remedy in an age discrimination case. The court noted (*ibid.*) that the relationship of the federal government with its employees is fundamentally different from the government's role as sovereign over private citizens generally, a consideration that has been recognized in the decisions of this Court (see *Sampson* v. *Murray*, 415 U.S. 61, 83 (1974), and *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (opinion of Powell, J.)) and that led to a similar result in the analogous Civil Service remedial context in *Bush* v. *Lucas*, 647 F. 2d 573, 576 (5th Cir. 1981), petition for cert. pending, No. 81-469. Therefore, the court held (Pet. App. A-7), in the absence of affirmative contrary indications from Congress and in light of the existence of ADEA remedies for age discrimination in federal employment, a constitutional remedy should not be implied in this case.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Accordingly, further review is unwarranted.

In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court held that, at least in some circumstances, a person aggrieved by unconstitutional federal action may bring suit against the offending federal officials, based directly on the Constitution, to recover damages for the injuries suffered. In *Carlson* v. *Green*, 446 U.S. 14 (1980), however, the Court declared that a *Bivens* remedy will not be available in either one of two situations: (1) where there are "special factors counselling hesitation" in implying a

constitutional remedy in the absence of affirmative action by Congress, or (2) where Congress has provided an equally effective alternative remedy under circumstances suggesting that it is meant as a substitute for a constitutional remedy. 446 U.S. at 18-19. Under either of these criteria, a *Bivens* remedy for petitioner is not appropriate and his constitutional claims were correctly dismissed.

1. The court of appeals correctly held that the ADEA remedies provided by Congress were intended to exclude a *Bivens* remedy. As originally enacted in 1967, the ADEA covered only private sector employment. 29 U.S.C. (1970 ed.) 621 *et seq.* Congress amended the Act in 1974 to add Section 15, 29 U.S.C. 633a, extending the Act's protections against age discrimination in employment to federal employees. Section 15 was modeled after Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16,[3] which was added in 1972 to extend Title VII protection to federal employees for employment discrimination based on race, color, religion, sex or national origin. *Brown* v. *GSA*, 425 U.S. 820 (1976). Congress' clear intent in enacting Section 15 of the ADEA was to close "an important gap in coverage" left after the Title VII amendment (120 Cong. Rec. 4707 (1974) (remarks of Sen. Church)) and to apply "the principles underlying [Section 717]" in extending similar remedies and enforcement mechanisms for age discrimination in federal employment. 118 Cong. Rec. 15894-15895, 24397 (1972) (remarks of Sen. Bentsen). Indeed, the language extending protection to federal employees under both sections is substantially identical,[4] and this Court has recognized that the ADEA and Title VII share a common purpose. *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979).

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[3]See *Lehman* v. *Nakshian*, No. 80-242 (June 26, 1981), slip op. 10-11.

[4]Compare Section 15(a) of the ADEA, 29 U.S.C. 633a(a), with Section 717(a) of Title VII, 42 U.S.C. 2000e-16(a).

Oscar Mayer involved the construction of 29 U.S.C. 623(b), a section of the ADEA concerned with resort by private sector claimants to state age discrimination remedies. The Court held that Section 633(b) should be read as manifesting a congressional intent to impose the same requirements as those imposed in a Title VII section (42 U.S.C. 2000e-5(c)) that employed virtually identical language and that served as the model for the ADEA provision. 441 U.S. at 756. Following that reasoning, the court below correctly held that since the remedies available to federal employees for other forms of discrimination under Section 717 of Title VII—the model for Section 15 of the ADEA—were intended by Congress to be exclusive and preemptive (*Brown* v. *GSA, supra,* 425 U.S. at 829), then Section 15 also must have been intended by Congress to provide a federal employee's exclusive and preemptive remedy for age discrimination in employment.[5]

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[5]The Court's holding in *Brown* was based both on the legislative history and the "balance, completeness, and structural integrity" of Section 717 of Title VII (425 U.S. at 832), factors that quite clearly are also present here. Section 15 affords substantial and effective relief for age discrimination violations. Age discrimination complaints are processed through the same administrative regulations under which federal employee Title VII rights are enforced. 29 C.F.R. 1613.213 *et seq.*, 1613.511. These regulations provide for pre-complaint processing by EEO counselors, investigation of complaints by EEO officers, informal adjustment of complaints, hearings and written decisions by agency officials on complaints that are not informally resolved, and appeals to the EEOC. Claims of reprisal, like those asserted by petitioner, are remediable under the same regulatory system. 29 C.F.R. 1613.261-1613.262, 1613.511. Available administrative relief includes back pay, attorney's fees, costs, retroactive promotions, and any other appropriate remedy. 29 C.F.R. 1613.217(a), 1613.221(d), 1613.271(b). On appeal to the district court under the ADEA, the plaintiff is entitled to a trial de novo, and the court may award appropriate "legal or equitable relief." 29 U.S.C. 633a(c). In short, the remedies afforded under the ADEA are balanced, complete, and sufficient to make an aggrieved employee whole.

2. The court of appeals was also correct in holding that special factors present in the federal employer-employee relationship preclude the availability of a *Bivens* remedy in this case. The court relied on the reasoning of *Bush* v. *Lucas*, 647 F. 2d 573, 576 (5th Cir. 1981), petition for cert. pending, No. 81-469, in which the Fifth Circuit denied a *Bivens* remedy for a federal employee in the analogous Civil Service adverse action context, based on the government's traditionally wide discretion and control over the management of its personnel and internal affairs, and Congress' efforts to provide a comprehensive remedial scheme. The same considerations are present here. The government's arguments on this point have already been set forth in detail in the Brief for the Respondent in Opposition in *Bush* (at 6-9), filed with the Court on November 12, 1981, and we adopt those arguments here.[6] We point out in addition that, in modeling ADEA age discrimination coverage of federal employees on the comprehensive remedies available to federal employees under Title VII for other forms of discrimination in employment, Congress has provided fully effective remedies for federal employees with age discrimination claims. Cf. *Carlson* v. *Green, supra*, 446 U.S. at 20-21. This statutory scheme should not be undercut by permitting recourse to an additional remedy directly under the Constitution.

3. Finally, as explained in our brief in *Bush* v. *Lucas* (at 11-12), decisions of other courts of appeals as to the availability of a *Bivens* remedy are consistent with the decision below. This case, accordingly, presents no conflict requiring resolution by this Court.

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[6]We have sent a copy of our brief in *Bush* to petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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